AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 396. 134.

GUARANTY SAVINGS BANK, PLAINTIFF IN ERROR,

vs.

ALBERT BLADOW.

IN ERROR TO THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR HIGHLAND COUNTY, STATE OF NORTH DAKOTA.

RECORD FILED SEPTEMBER 12, 1906.
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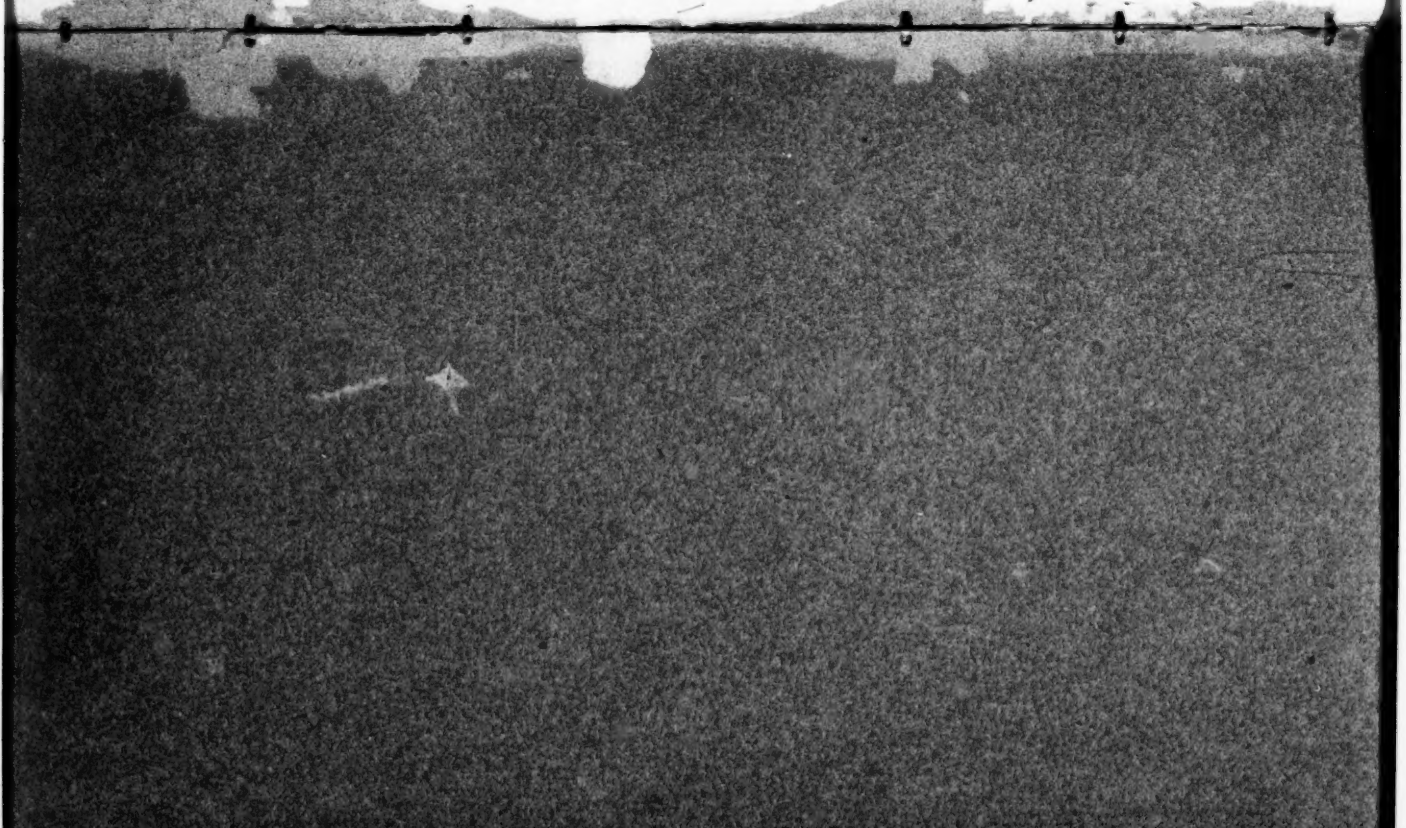
(16,984.)



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(16,984.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

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GUARANTY SAVINGS BANK, PLAINTIFF IN ERROR,

vs.

ALBERT BLADOW.

IN ERROR TO THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR RICHLAND COUNTY, STATE OF NORTH DAKOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1898.

1 In the United States Supreme Court.

THE GUARANTY SAVINGS BANK, Plaintiff in Error,
vs.
ALBERT BLADOW, Defendant in Error.

It is hereby agreed by and between the respective parties, plaintiff and defendant, in the above-entitled action that the material points of the record in said cause necessary to have printed for the consideration of the Supreme Court of the United States on the hearing of the writ of error herein consist of the complaint, answer of defendant Bladow; agreed statement of the facts; the opinion of the supreme court of the State of North Dakota on said appeal; the remittitur sent down with the record in said cause from the supreme court of the State of North Dakota to the district court of Richland county, dated November 10th, 1896; the judgment entered in the district court of Richland county on the 12th day of May, 1898, in obedience to said remittitur, and the assignments of error filed herein with the writ of error by the plaintiff in error. True copies of all of said papers are hereunto annexed for the convenience of the clerk of the Supreme Court of the United States in the printing of said record.

Dated September 5th, 1898.

S. B. PINNEY,
Attorneys for the Plaintiff in Error.
WM. H. STANDISH,
Attorneys for the Defendant in Error.
W. E.

2 In the United States Supreme Court.

THE GUARANTY SAVINGS BANK, Plaintiff in Error,
vs.
ALBERT BLADOW, Defendant in Error.

The Guaranty Savings Bank, as plaintiff, commenced this action in the district court of Richland county, North Dakota, against Charley Anderson, Franklin Hall, and Albert Bladow, and stated its cause of action in the following—

Complaint.

I.

That the plaintiff is a corporation duly organized and existing under the laws of the State of New Hampshire and having its principal place of business in the city of Manchester, in said State.

II.

That on the 20th day of July, 1881, the above-named defendant, Charley Anderson, made, executed, and delivered to H. E. Fletcher,

of Minneapolis, Minnesota, his promissory note in writing, of that date, whereby, on the first day of December, 1886, he promised and agreed to pay to the order of the said H. E. Fletcher, at his office, in the city of Minneapolis, in the State of Minnesota, the sum of four hundred and fifty dollars ($450.00), with interest thereon, at the rate of 12 per cent. per annum, after maturity until paid.

III.

That on the 20th day of July, 1881, the above-named defendant, Charley Anderson, made, executed, and delivered to H. E. Fletcher his certain promissory note in writing, of that date, whereby, on the first day of December, 1886, he promised and agreed to pay to the order of the said H. E. Fletcher, at his office, in Minneapolis, Minnesota, the sum of thirty-six ($36.00) dollars, with interest, at the rate of 12 per cent. per annum, after maturity until paid.

3 IV.

That on the 20th day of July, 1881, the defendant, Charley Anderson, made, executed, and delivered to H. E. Fletcher his certain other promissory note in writing, of that date, whereby, on the first day of December, 1885, he promised and agreed to pay to the order of the said H. E. Fletcher, at his office, in the city of Minneapolis, Minnesota, the sum of thirty-six ($36.00) dollars, with interest, at the rate of 12 per cent. per annum, after maturity until paid.

V.

The said defendant, Charley Anderson, to secure the payment of said promissory notes and interest thereon, as mentioned in said notes, according to the tenor thereof, did, on the 20th day of July, 1881, make, execute, and deliver to said H. E. Fletcher his certain mortgage deed of that date of and upon the following-described real estate, situated in the county of Richland, in the then Territory of Dakota, now State of North Dakota, to wit:

The north half of northeast quarter of section twenty-four (24), township one hundred and thirty-one (131), range fifty (50), and west half of northwest quarter of section nineteen (19), township one hundred and thirty-one (131), range forty-nine (49) west, of the fifth principal meridian.

VI.

That said mortgage was duly filed for record in the office of the register of deeds in and for said county of Richland, in the then Territory of Dakota, now State of North Dakota, on the 25th day of July, 1881, at 11 o'clock in the forenoon, and duly recorded in Book "E" of Mortgages, on page 433.

VII.

That said mortgage was, on the 20th day of June, 1882, for a valuable consideration, duly assigned to the plaintiff by an instrument in writing, dated on said day; which said assignment was filed for

record in the office of the register of deeds in and for Richland county, in the then Territory of Dakota, now State of North Dakota, on the 2nd day of October, 1894, at eleven o'clock in the fore-
4 noon, and duly recorded in Book "N" of Mortgages, on page 211, and the plaintiff is now the owner and holder of the notes and mortgage.

VIII.

That said mortgage contained, among other things, the agreements, conditions, and covenants that if any part of said promissory notes or the interest thereon, as aforesaid, should remain unpaid after the same should become due and payable, or if said defendant, Charley Anderson, failed to comply with any of the agreements or conditions contained in said mortgage, or if said mortgagee or his assigns should fail to pay the taxes levied or assessed against said land, then in such case the said H. E. Fletcher or his assigns might proceed forthwith to collect the same by foreclosure or otherwise.

And it is further provided and agreed by the terms of said mortgage that in case legal proceedings should be commenced for the foreclosure of said mortgage, said H. E. Fletcher or his assigns should be entitled to and might tax with the costs of foreclosure the sum of fifty dollars ($50.00) attorney's fees, in addition to the sum or costs allowed in full by the law, and such mortgage was given to secure the same as part of the debt secured thereby.

IX.

That default has been made in the conditions of said notes and mortgage in this, that said notes were not paid at maturity thereof, or at all, or any part thereof, and said mortgagor failed to pay the sum of thirty-three and seventy-nine one-hundredths dollars ($33.79), taxes levied and assessed against said land for the years 1887, 1888, and 1889; which said sum plaintiff was obliged to pay and did pay on the 14th day of August, 1890, and there is now due and owing the plaintiff from said defendants on said notes and mortgage,
5 according to the terms and conditions thereof, the sum of five hundred twenty-two dollars ($522.00), with interest at the rate of 12 per cent. per annum on four hundred eighty-six — ($486.00) thereof from and since the first day of December, 1886, and interest at the rate of 12 per cent. per annum on thirty-six dollars ($36.00) thereof from and since the first day of December, 1885, and the further sum of thirty-three and seventy-nine one-hundredths dollars ($33.79), taxes paid by said plaintiff, as aforesaid, with interest thereon at the rate of 12 per cent. per annum from and since the 14th day of August, 1890, all according to the terms and conditions of said notes and mortgage.

X.

That there has been no proceedings had at law or otherwise for the recovery of the debt secured by said mortgage, or any part thereof.

XI.

That on the 8th day of May, 1882, said defendant, Charley Anderson, by warranty deed, did on said day convey said above-described land and premises to one R. N. Ink, which said deed was filed for record in the office of the register of deeds in and for Richland county, in the then Territory of Dakota, now State of North Dakota, on the 10th day of May, 1882, at 10 o'clock in the forenoon, and was duly recorded in Book "D" of Deeds, on page 15, and said R. N. Ink, on the 7th day of April, 1883, by warranty deed, dated on said date, conveyed said land and premises to one J. S. Ink, which said deed was filed for record in the office of the register of deeds in and for Richland county, in the then Territory of Dakota, now State of North Dakota, on the 9th day of April, 1883, at 10 o'clock in the forenoon, and was duly recorded in Book "D" of Deeds, on page 291; that on the 6th day of January, 1885, said J. S. Ink, by warranty deed, dated on said day, conveyed said land and premises to the defendant herein, Albert Bladow, which said deed was filed in the office of the register of deeds in and for said county of Richland, in the then Territory of Dakota, now State of
6 North Dakota, on the 6th day of January, 1885, at three o'clock in the *fore*noon, and was duly recorded in Book "K" of Deeds, on page 55, and said defendant, Albert Bladow, under said deed, took possession of said land and premises and has ever since remained in possession as owner thereof in fee-simple.

XII.

That said defendant, Franklin Hall, has or claims to have some interest or lien upon the premises herein described, which said interest or lien is a mortgage in the sum of five hundred dollars ($500.00), made, executed, and deliver- by said defendant, Albert Bladow, to said defendant, Franklin Hall, on the 22nd day of November, 1893, and filed for record in the office of the register of deeds in and for Richland county, North Dakota, on the 4th day of December, 1893, at three o'clock in the *fore*noon, and duly recorded in Book 10 of Mortgages, on page 378, and said lien of said defendant, Franklin Hall, upon the premises herein described, acquired by him by, through, and under said mortgage was and is subject to the lien of the mortgage of the plaintiff herein, and said mortgage of the plaintiff herein is a first lien upon said premises herein described.

Wherefore plaintiff demands judgment against the defendants:

First. For the sum of five hundred and fifty-five and seventy-nine-hundredths ($555.79) dollars, and interest on the sum of four hundred eighty-six dollars ($486.00) thereof, at the rate of 12 per cent. per annum, from and since the 1st day of December, 1886, and interest on the sum of thirty-six dollars ($36.00) thereof, at the rate of 12 per cent. per annum, from and since the 1st day of December, 1885, and interest on the sum of thirty-three and seventy-nine one-hundredths dollars ($33.79) thereof, at the rate of 12 per cent. per annum, from and since the 14th day of August, 1890, and

the further sum of fifty dollars ($50.00) attorney's fees, as provided for in said mortgage, and the costs and disbursements of this action.

7 Second. That the usual decree be made for the foreclosure of said mortgage and the sale of the premises herein described, or so much thereof as may be necessary to pay the sum found due, with interest, costs, and attorney's fees, and costs of such sale, and the payment out of the proceeds of the amount of said judgment, so far as the proceeds will pay the same; that the plaintiff may have execution against the property of said defendants for any deficiency that may remain after applying all the proceeds of such sale of such premises properly applicable thereto and the satisfaction of said judgment.

Third. That said defendants, Albert Bladow and Franklin Hall, may be forever barred and foreclosed of all rights, claims, liens, and equity of redemption in and to the said premises and every part thereof, except only the right of said defendants to redeem the premises within one year after such sale.

Fourth. That all said defendants and each of them and all persons claiming or to claim by, through, or under said defendant, Charley Anderson, be forever barred and foreclosed of all rights, claims, liens, and equity of redemption in and to said premises and every part thereof, except only by right of said defendants to redeem the premises within one year after such sale, and the possession of said premises be delivered to such purchaser at such sale on the production of the sheriff's deed to the premises; that the plaintiff or any party to this action may become a purchaser at such sale.

Fifth. That the plaintiff may have such other and further or different relief in the premises as may be just.

Dated this 17th day of January, 1894.

FRED B. MORRILL,
Plaintiff's Attorney.

(Verified.)

8 The defendants Charley Anderson and Franklin Hall made no appearance in the action, but the defendant Albert Bladow appeared therein and filed the following—

Answer.

First. That he denies each and every allegation in said complaint contained not hereinafter admitted, qualified, or explained.

Second. That as to the matters alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 in said complaint, defendant has not knowledge or information sufficient to enable him to form a belief, and he therefore denies the same generally and specifically.

Third. Defendant expressly denies that the plaintiff has paid or caused to be paid the sum of $33.79 or any other sum for taxes upon the premises described in plaintiff's complaint for the years 1887, 1888, and 1889 or for any other years; and in that behalf the defendant alleges that during all of said years said land was not

subject to taxation, for the reason that the title to the same was in the Government of the United States.

Fourth. Defendant alleges that the land described in plaintiff's complaint as the north half of the northeast quarter of section twenty-four, in township one hundred thirty-one north, of range fifty, and the west half of the northwest quarter of section nineteen, in township one hundred thirty-one north, of range forty-nine west, are the same lands otherwise known and described in the United States Government survey thereof as the north half of the northeast quarter of section twenty-four, in township one hundred thirty-one north, of range 50 west, and lots one and two, in section nineteen, in township one hundred and thirty-one north, of range forty-nine west.

Fifth. Further answering, the defendant alleges that he is the absolute owner of the lands above described and the whole thereof, and has been such absolute owner from and since the 6th day of July, 1893, upon which day the Government of the United States, by its instrument in writing, known as a patent, dated on that
9 day, conveyed said premises to this defendant, which instrument in writing, known as a patent, was filed for record in the office of the register of deeds of Richland county, North Dakota, on the 25th day of October, 1893, at the hour of 2.15 o'clock p. m., and duly recorded in said office in Book "P" of Deeds, at page 234.

Sixth. Defendant alleges upon information and belief that during the year 1881 one Charley Anderson, named in plaintiff's complaint as the mortgagor therein mentioned, made an entry of said lands under the laws of the United States relative to and regulating the acquirement of lands of the United States by private individuals under the provisions of the law relative to pre-emptions, and that thereafter and on the 20th day of July, 1881, the said Charley Anderson made final proof upon said lands under the laws regulating pre-emptions, and made payment therefor to the receiver of the land office at Fargo, in the then Territory of Dakota, and on said day received from the receiver his duplicate receipt in writing acknowledging the payment to him of the purchase price of said lands by the said Charley Anderson, which receiver's receipt was filed for record in the office of the register of deeds of Richland county, in the then Territory of Dakota, on the 25th day of July, 1881, at 11 o'clock a. m., and was therein recorded in Book "D" of Deeds, at page 529.

Seventh. Defendant further alleges that the final proof aforesaid of Charley Anderson upon said lands was wholly false and fraudulent, and made by the said Charley Anderson with intent to defraud the Government of the United States out of said lands; that said Charley Anderson, at no time prior to the making of said final proof and the issuance to him of said receiver's receipt for payment of the purchase price of said lands, ever lived upon, occupied, or cultivated said lands or any portion thereof.

Eighth. That after the making of said final proof by said Anderson and the issuance to him of said receiver's receipt, as
10 aforesaid, and prior to the year 1889, by an order of the Secretary of the Interior of the United States, the entry of said

Charley Anderson for and upon said lands, together with the receiver's receipt aforesaid, issued therefor, were cancelled and declared wholly null and void, and said lands were, by an order of the said Secretary of the Interior, declared to be public lands of the United States, subject to entry under the homestead laws of the United States; that in the year 1888 this defendant made due lawful entry of said lands under the homestead laws of the United States, and that from said time up to the present time this defendant has been and now is in the open, notorious, and exclusive possession of said lands and the whole thereof.

Ninth. That this defendant is now the absolute owner in fee of said land and the whole thereof.

Wherefore this defendant prays judgment of this court (1) that the plaintiff take nothing by this action; (2) that this defendant have judgment against the plaintiff for his costs and disbursements herein; (3) that in this action this court determine by its proper decree that the plaintiff has no estate, right, title, interest in or claim upon said land or any part thereof; (4) that the title of this defendant to said lands and the whole thereof be declared, as against the plaintiff in this action, good and valid; (5) for such other and further relief as to the court may seem just in the premises.

Dated January 31st, 1894.

W. E. PURCELL,
Defendant Bladow's Attorney.

Verified.

Thereupon the issue made by the foregoing complaint and answer was submitted to the district court of Richland county on the following—

Agreed Statement of Facts.

1. That on the 6th day of January, 1881, the defendant
11 Charley Anderson filed in the United States land office at Fargo, in the then Territory of Dakota, his homestead application to enter the following described land, situated in Richland county, now State of North Dakota, and which land is the same land involved in this action, to wit: The north half of the northeast quarter of section twenty-four, in township one hundred thirty-one north, of range 50 west, and the west half of the northwest quarter of section nineteen, township one hundred thirty-one north, range forty-nine west, containing one hundred and forty-three and twenty-nine one-hundredths acres of land, according to the Government survey thereof; that said homestead application was passed upon by the register and receiver of said land office, by them accepted and placed of record, and receipt numbered 7471 issued to said Charley Anderson, he paying to the receiver the legal fees therefor, to wit, the sum of $14.00.

2. That after due notice by publication, pursuant to an order of the register of the above-named land office, the said Charley Anderson, on the 20th day of July, 1881, appeared before the register and

receiver of said land office, with his witnesses, and submitted and presented his final proof under section 2301 of the Revised Statutes of the United States, consisting of his testimony and the testimony of his witnesses in due form; that said proof and testimony was duly considered and passed upon by the register and receiver of said land office and by them accepted, allowed, and placed of record, and said Charley Anderson paid to the receiver of said land office for the Government of the United States the sum of $179.11, in full payment of the required fees and commissions of said land, and the register and receiver of said land office issued to said Charley Anderson their final certificate and receipt numbered 2971 therefor, there being no adverse claim to said tract; that said final receipt was filed for record in the office of the register of
12 deeds in and for the county of Richland, North Dakota, on the 25th day of July, 1881, at 11 o'clock a. m., and duly recorded in Book "D," at page 529.

3. That on the 20th day of July, 1881, and after said proof and payment, the said Charley Anderson duly mortgaged said lands to one H. E. Fletcher by instrument of mortgage executed on that date, being for the payment of the sum of $450.00; which mortgage was recorded in the office of the register of deeds of said county on the 25th day of July, 1881, at 11 o'clock a. m., in Book "E" of Mortgages, at page 433.

4. That on the 20th day of July, 1881, and after said proof and payment, said Charley Anderson duly mortgaged said lands to H. E. Fletcher by an instrument of mortgage dated on said date for the sum of $48.75; which mortgage was duly recorded in the office of the register of deeds on the 26th day of July, 1881, at 11 o'clock a. m., in Book "E" of Mortgages, at page 531.

5. That said first-mentioned mortgage was given by said Anderson to secure the payment of a certain promissory note executed and delivered by said Anderson to said H. E. Fletcher, whereby said Anderson promised to pay to the order of said Fletcher on the 1st day of December, 1886, the sum of $450.00, with interest thereon, at the rate of 12 % per annum, from and after maturity until paid; that attached to said first note and as a part thereof were five coupon notes for the sum of $36.00 each, representing the interest on said first note to the maturity thereof, each of said coupon notes bearing interest from and after maturity until paid at the rate of 12 per cent. per annum.

6. That thereafter and on the 20th day of June, 1882, the said H. E. Fletcher, for value received, assigned said first-mentioned mortgage to the plaintiff herein by an instrument in writing, dated on that day; which assignment was duly filed in the office of the register of deeds in and for said county on the 2nd day of October, 1884, at 7 o'clock a. m., and recorded in Book "M," at page 211; that said assignment was not under seal of the assignor, and
13 the signature of said H. E. Fletcher thereto was not witnessed, but said assignment was acknowledged before George A. Parker, a notary public of Hennepin county, Minnesota, by said H. E. Fletcher on the 20th day of June, 1882.

7. That thereafter and on the 20th day of November, 1883, in consideration of the full payment of said H. E. Fletcher thereof, the said H. E. Fletcher made, executed, and delivered to said Charley Anderson a satisfaction in due form of the mortgage mentioned second herein and of record in Book "E" of Mortgages, at page 431, which satisfaction was duly recorded in the office of the register of deeds on the 6th day of January, 1885, at 2 o'clock p. m., in Book "N," at page 273.

8. That said note for $450.00 and the coupon notes thereto attached, each for $36.00, and none of them has ever been paid, except that three of said coupon notes for $36.00 each were paid at maturity, and that the plaintiff is still the owner of said notes and mortgage, and that said mortgage has never been satisfied, but remains of record as aforesaid; that there is now due and owing the plaintiff on said notes and mortgage the sum of $522.00, with interest, at the rate of 12 per cent. per annum, on the sum of $486.00 from the 1st day of December, 1886, and interest, at the rate of 12 per cent. per annum, on the sum of $36.00 thereof from the 1st day of December, 1885.

9. That said mortgage was given by said Charley Anderson to the said H. E. Fletcher in the regular course of business and in good faith accepted by said H. E. Fletcher as security for the payment of the notes as aforesaid; that the assignment of said notes and the mortgage by the said H. E. Fletcher to the plaintiff was in the regular course of business, and plaintiff in good faith paid a valuable consideration for said notes and mortgage.

10. That on the 8th day of May, 1882, said Charley Anderson, by an instrument in writing known as a warranty deed, dated on that day, conveyed said land to one R. N. Ink, which deed was
14 recorded in the office of the register of deeds of said county on the 10th day of May, 1882, at 10 o'clock a. m., in Book "G" of Deeds, at page 15.

11. That on the 7th day of April, 1883, by an instrument in writing known as a warranty deed, the said R. N. Ink and Alta M. Ink, his wife, conveyed said premises to J. S. Ink, and that said deed was duly recorded in the office of the register of deeds of said county on the 9th day of April, 1883, at 10 o'clock a. m., in Book "G" of Deeds, at page 291.

12. That on the 6th day of January, 1885, by an instrument in writing known as a warranty deed, the said J. S. Ink and Della C. Ink, his wife, conveyed said premises to the defendant Albert Bladow, and that said deed was duly recorded in the office of the register of deeds of said county on the 6th day of January, 1885, at 3 o'clock p. m., in Book "K" of Deeds, at page 55, and the said Albert Bladow at once entered into possession of said premises under said deed, and has ever since remained and still is in possession thereof.

13. That on the 14th day of March, 1882, after the final proof of said Charley Anderson upon said lands had been made and passed upon by the register and receiver of said land office, and after the record thereof had been transmitted to the General Land Office, at Washington, D. C., the Commissioner of the General Land Office,

by letter "C" of March 14, 1882, held said entry of Charley Anderson upon said land, and directed the register and receiver of said land office to hold said entry for cancellation upon the ground that the testimony in said final proof of said Anderson for said tract of land was evasive and failed to show six months' residence.

14. That thereafter, to wit, on the 22nd day of January, 1886, the defendant Albert Bladow filed in the land office at Fargo, in the then Territory of Dakota, his application and affidavit to contest the entry of said Charley Anderson upon said lands on the grounds that the proof furnished by said Anderson upon said entry was
15 false in fact, and that said entry was fraudulent, and in said affidavit set forth that said Anderson had never established his residence upon said land, and had never resided thereon, and never made the same his home, as provided by the homestead laws of the United States.

15. That thereafter the Commissioner of the General Land Office, at Washington, D. C., upon such application and affidavit ordered and directed that a hearing be had before the register and receiver of the land office at Fargo between the defendant Albert Bladow and said Charley Anderson as to the truth of the allegations in said Bladow's affidavit and application for contest; that due notice of said hearing was given to said Charley Anderson by publishing the same in accordance with the order of the register of said Fargo land office, made upon an affidavit that personal service could not be made upon said Anderson; that at such hearing the said Albert Bladow appeared with his witnesses and gave evidence tending to establish as true the allegations of his said affidavit of contest, no appearance being made or testimony offered by said Anderson; that thereafter, and after the said hearing, and after the evidence taken thereupon had been transmitted to the Commissioner of the General Land Office, at Washington, D. C., and on the 14th day of November, 1887, said Commissioner ordered and directed that the entry of said Charley Anderson of and upon said lands be cancelled; and thereafter, in due and usual course of business, the register and receiver of the land office at Fargo duly cancelled said entry of record and notified the defendant Albert Bladow thereof.

16. That after the final decision of the said Commissioner of the General Land Office upon said contest and after the cancellation of the entry of said Anderson the defendant Albert Bladow duly made his homestead entry of and upon said lands, and thereafter, to wit, on April 26th, 1893, duly submitted his final proof therefor, which was passed upon by the register and receiver of the
16 land office and on said date placed of record and final receipt and certificate in due form issued to said Albert Bladow by the register and receiver of said land office at Fargo; and thereafter, on the 6th day of July, 1893, the Government of the United States issued upon said final receipt and certificate to said Albert Bladow a patent for said lands, conveying said premises to the defendant Albert Bladow, which patent was recorded in the office of the register of deeds of said county on the 25th day of October, 1893, in Book "P" of Deeds, at page 234.

17. That in the patent from the Government of the United States to the said Albert Bladow the premises herein involved were and are described as follows: Lots one and two of section nineteen, township one hundred and thirty-one north, of range forty-nine west, and north half of the northeast quarter of section twenty-four, township one hundred thirty-one north, of range 50 west; that said lands described are the same lands that are involved in this action and herein first described.

18. That the plaintiff has never been in the possession of said lands or any portion thereof.

19. That no notice of cancellation of said homestead entry and cash certificate of Charley Anderson was ever given to said H. E. Fletcher or the plaintiff herein, and such cancellation was made without actual notice of the decision of the Commissioner of the General Land Office to either said H. E. Fletcher or to the plaintiff, and neither said H. E. Fletcher nor the plaintiff herein was served with any notice of the contest of Albert Bladow involving said land, nor was the plaintiff or said H. E. Fletcher made any party defendant in said contest of Albert Bladow.

20. That the defendant Albert Bladow, in reliance upon his title and ownership of said lands as hereinbefore set forth, has since continued in possession thereof and made valuable improvements upon said premises by breaking and cultivating said lands and by erecting thereon buildings and permanent improvements of the value at least $800.00.

17 21. That the $14.00 fees and commissions paid by said Charley Anderson to the receiver of the Fargo land office on his homestead entry No. 7471 and the $179.11 fees and commissions paid by said Charley Anderson to the receiver of said land office on his cash entry No. 2791 has never been repaid and *is* still retained by the Government of the United States on his homestead and cash entries.

22. That upon the testimony submitted to the land department in the contest case of Albert Bladow against Charley Anderson, as heretofore set forth, the register and receiver of the Fargo land office and the Commissioner of the General Land Office found and decided as a conclusion of fact that the said Anderson had never resided upon said lands as required by law, and that his said entry was fraudulent, and said entry was therefore ordered and directed to be cancelled and was so cancelled upon such testimony as a fraudulent entry; that no appeal was ever taken by said Anderson from said decision.

23. That after the cancellation of the said entries of Charley Anderson, to wit, on June 15th, 1891, the plaintiff filed in the United States land office at Fargo proof of its interests as assignee of mortgagee in the lands herein involved, and moved that the patent be issued under the provisions of section 7 of the act of March 3rd, 1891, which motion was denied by the Commissioner of the General Land Office on the 13th day of August, 1891; that from said decision of the Commissioner of the General Land Office the plaintiff in this action, by its attorney, Fred B. Morrill, prosecuted

an appeal to the Secretary of the Interior, who, on the 15th day of July, 1892, rendered his decision thereon denying said motion.

24. That after the cancellation of the said entries of Charley Anderson and prior to the making of the final proof for said land by the defendant Albert Bladow, to wit, in the years 1887, 1888, and 1889, the proper authorities in that behalf levied and assessed or attempted to levy and assess taxes against said land in the total sum of $33.79, which the defendant failed and neglected to pay,
18 which amount the plaintiff herein paid to the treasurer of said Richland county on the 14th day of August, 1890, and received tax receipts therefor.

25. That the foregoing, together with the pleadings herein, certified copies of the patent from the Government of the United States to the defendant Albert Bladow mortgage of Charley Anderson to H. E. Fletcher as herein set forth, deed from J. S. Ink to defendant Albert Bladow, and such other records, certified copies of record, decision of the Commissioner of the General Land Office and Secretary of the Interior, and other testimony, as submitted herein, and the whole thereof, are hereby introduced and presented to the court as evidence and testimony in this case.

Dated this 30th day of March, A. D. 1895.

FRED B. MORRILL,
Attorney for Plaintiff.
W. E. PURCELL &
CHAS. E. WOLFE,
Attorneys for Defendant Albert Bladow.

Thereupon the said district court made and entered the following judgment:

On reading and filing the findings of fact and conclusions of law as made and found in the above-entitled action by the judge of this court, dated on the 17th day of April, 1895, and on the motion of W. E. Purcell and Charles E. Wolfe, attorneys for the defendant Albert Bladow, it is—

Ordered, adjudged, and decreed that the defendant Albert Bladow is the owner in fee-simple of that certain real estate situated in the State of North Dakota and county of Richland, described as follows:
Lots one and two, in section nineteen, in township one hundred thirty-one north, of range forty-nine west, and the north half
19 of the northeast quarter of section twenty-four, township one hundred thirty-one north, of range fifty west.

It is further ordered, adjudged, and decreed that the certain mortgage made and executed by the defendant Charley Anderson on the 20th day of July, 1881, whereby said lands were mortgaged to one H. E. Fletcher, to secure the payment of $450.00, which mortgage was recorded in the office of the register of deeds of Richland county, North Dakota, on the 25th day of July, 1881, at 11 o'clock a. m., in Book "E" of Mortgages, on page 433, which mortgage is now owned by the plaintiff in this action, is no lien upon and conveys no title to nor interest in the said premises nor any part thereof.

It is further ordered, adjudged, and decreed that said mortgage,

in so far as it is an apparent cloud upon the title of said defendant, Albert Bladow, to the said lands or any part thereof be, and it is hereby, cancelled.

It is further ordered, adjudged, and decreed that a copy of this decree may be recorded in the office of the register of deeds of said Richland county, and when so recorded the same shall be notice to all the world of the cancellation of said mortgage and the removal of the cloud arising therefrom from the title of the said Albert Bladow to said lands and the whole thereof.

It is further ordered, adjudged, and decreed that the defendant Albert Bladow have and recover of the plaintiff, The Guaranty Savings Bank, his costs and disbursements of this action, to be hereafter taxed and herein inserted by the clerk of this court.

Witness the Honorable W. S. Lauder, judge of the district court of the fourth judicial district of the said North Dakota, and my hand and the seal of this court, this 15th day of July, 1895, at Wahpeton, Richland county, North Dakota.

[SEAL.] C. A. McKEAN,
Clerk of the District Court, Richland County, N. D.

Thereupon the Guaranty savings bank perfected an appeal from said judgment to the supreme court of the State of North
20 Dakota, relying, on said appeal, on the following—

Assignments of Error.

1st. That the cancellation of Anderson's entry by the Commissioner of the General Land Office on the *ex parte* contest initiated by Bladow without notice to the mortgagee was contrary to law and void.

2nd. That Anderson's entry was confirmed and binding, and patent thereunder *and* should have been issued under section 7 of the act of March 3, 1891, entitled "An act for the repeal of the timber-culture law and for other purposes."

3rd. That the defendant Bladow, having purchased, subject to the mortgage, the title acquired by Anderson before the cancellation of Anderson's entry, is estopped from setting up any defense to the validity of the mortgage.

Thereupon the supreme court of the State of North Dakota rendered the following—

Opinion.

CORLISS, *J.:*

As originally instituted, this action had for its sole object the foreclosure of a mortgage, but on the trial it developed into a controversy over the legality of the cancellation by the Land Department of a homestead entry. The cause has been argued in this court on the theory that the plaintiff was in position to challenge the validity of such cancellation and to secure the benefits of the patent subsequently issued by the Government to a third person, based upon a new entry. The original entry was made by one

Anderson in January, 1881. In July, 1881, he executed a mortgage upon his interest in the land to secure the payment of $450. This mortgage was in June, 1882, assigned to plaintiff. It is to foreclose this mortgage that this action was commenced. Subsequently to the execution thereof the land was conveyed to the defendant Bladow. Thereafter such proceedings were had before the Land Department that on November 14, 1887, the Commissioner thereof ordered that the entry made by Anderson be cancelled. In these pro-
21 ceedings the commissioner found as a fact that Anderson had never resided upon the land, as required by law, but that his entry was fraudulent, and the entry was cancelled on that ground. Neither the original mortgagee nor the plaintiff was a party to these proceedings or had any notice of them. So far as they were concerned, such proceedings were *ex parte*. Notice of the hearing was, however, served on Anderson by publication in accordance with the rules and practice of the Land Department. It is undisputed that the mortgagee loaned his money and took his mortgage in good faith and for value, and that he had no actual knowledge of the fact that Anderson's entry was fraudulent. After the original entry was cancelled defendant Bladow made a homestead entry upon the same land and subsequently obtained a patent therefor, based upon such entry. The decree in this case sustains this patent and adjudges that the mortgage is therefore not a lien upon the land, but is a cloud thereon, and should accordingly be cancelled. From this decree the plaintiff appeals.

In deciding this case we will adopt a theory more favorable to the plaintiff than the record will justify. We will assume that it has foreclosed its mortgage and has secured the rights of the mortgagor in the land. The only feature which distinguishes this case from Parsons *vs.* Venzke, 4 N. D. Rep., 452; 61 N. W. Rep., 1036, is the fact that the holder of the mortgage was not a party to the proceedings in the Land Department which culminated in the cancellation of Anderson's entry. This fact, does not, however, render the cancellation a nullity as to the mortgagee. The Land Department has, until a patent has been issued, complete control of the question whether it will cancel an entry. Its power is not dependent on jurisdiction over the person of any one, as the authority of a court is. By the issue of a certificate it does not lose control over the land. Such certificate is in effect no more than a statement that *prima facie* the person to whom it is issued appears to be en-
22 titled to a patent. Whether subsequent investigation will lead to a different conclusion is left unsettled, and whoever deals with the holder of such certificate is chargeable with knowledge that the proceedings instituted to secure the legal title to the land from the Government are *in fieri*, and that the Land Department may at any time revoke the certificate, thus destroying the entryman's *prima facie* right to the patent. What procedure it will adopt, what persons it will notify, or whether it will proceed on notice at all or not are matters within the discretion of the department, so far as the mere matter of power is concerned, Congress not having prescribed any practice in such cases. No matter how arbi-

trary the Land Department may act, its cancellation is not a mere nullity; but such arbitrary action will, however, entitle the entryman to a hearing in court, and on this hearing he will be allowed to show that, as a matter of fact, his entry was not fraudulent; but no such showing was made in this case. Indeed, it is not claimed that the entry was not in fact fraudulent. The Land Department has in such case, it is true, in the exercise of its undoubted power, destroyed his *prima facie* evidence of right to a patent, but because it has acted in an arbitrary manner, has denied him a hearing, the law will permit the entryman to prove in court the facts showing his entry to be valid, because the law regards the rights of an entryman who has in good faith complied with the statute as property rights, and will give him an opportunity to defend such rights, either in the Land Department or, if he is there denied a chance to protect himself, in the proper judicial tribunals. The only effect of the doctrine that an *ex parte* cancellation of an entry is not a mere nullity is to place the burden of proof upon the entryman or those who claim under him; but it cannot be disputed that the Land Department might, despite the fact that he holds a certificate, require the entryman to furnish additional proof of his good faith and his compliance with the requirements of law on proceedings in the Land Department instituted for the purpose of cancelling
23 his entry. The Land Department may, notwithstanding the fact that it has issued a final certificate, compel the entryman or any one claiming under him to assume the burden of proof on penalty of having the entry cancelled if additional proof is not produced. The utmost scope of the effect of the doctrine than an *ex parte* cancellation is valid is to cast upon the entryman in the court the very burden of proof which may be imposed upon him by the department itself. The contention against the soundness of this doctrine must be that he has a vested right to use the certificate as *prima facie* evidence of his right to a patent. There is nothing in the acts of Congress to warrant such a view; and to assert that it is sound on general principles is to assume the very point in controversy. The utmost which it can be said that the Government has done in issuing the certificate to him is to give him an instrument which will *prima facie* show that he is entitled to a patent so long as this instrument remains unannulled, but the same power which issued it is vested by Congress with full control over it, and may revoke it at any time, and the destruction of it carries along with it the necessary consequence that it can no longer be presented in evidence to any tribunal as the declaration of the Government that the person named in it has complied with the law and is entitled to a patent; but after a person has been accepted by the Government as an entryman it cannot escape the issuance of a patent to him if his entry was in fact legal, and this fact he may prove in the proper judicial tribunal if he is denied a hearing in the Land Department. In this way his property rights are fully protected. As he is compelled to pursue the legal title in the hands of one who has succeeded to the rights of the Government, he is of necessity obliged to make out against such person a legal right to demand the patent from the

Government. This he must do by evidence showing that his entry was in fact legal. He cannot use the cancelled certificate for that purpose, for to insist upon his right to use it is to assume
24 the legality of the entry—the very question to be established. He could not, as a matter of fact, use it as *prima facie* evidence in the Land Department before cancellation on the trial of the issue whether his entry was legal. How, then, can he claim that he has such a right to use it as evidence in a court after cancellation as constitutes a vested property right? It is obvious that if the mere fact that the cancellation of an entry was *ex parte* gives the entryman an absolute right to secure the patent from a third person to whom it has been issued, then it is of positive benefit to a fraudulent entryman to be denied a hearing in the Land Department. The denial of a hearing, although upon such hearing he should be defeated, places him in an impregnable position in his contest for the title. The very most which can possibly be claimed is that the original entryman should not be required to make out a *prima facie* case by evidence, but it should be permitted to rely upon the cancelled certificate as creating a presumption in his favor. This position, we have seen, is not tenable. The reasoning of this court in the case of Parsons *vs.* Venzke leads logically to the conclusion we have reached. The case of Mortgage Co. *vs.* Hopper, 56 Fed., 74, affirmed 12 C. C. A., 293; 64 Fed., 553, is directly in point. See also U. S. *vs.* Steenerson, 1 C. C. A., 552; 50 Fed., 507.

We are not unmindful of that fact that, in view of delays in the issuance of patents and the rule of law that until a patent has been issued the courts have no jurisdiction to redress the wrong done the original entryman or his grantee or mortgagee by an *ex parte* cancellation, injustice may result from the doctrine that the Land Department may thus impose upon such persons the burden of proving the original entry to have been legal. The earliest period at which they adduce proof to sustain the entry may be so remote from the time when such entry was made that no evidence can be obtained by them to support what was in fact a perfectly valid entry, but cases presenting these extreme features will not fre-
25 quently arise, and those who find themselves in this predicament are always somewhat in fault in not discovering the fact of the cancellation and making an effort to be heard in the Land Department to have the original entry reinstated. Moreover, in such cases the courts would incline to consider slight evidence as sufficient *prima facie* proof that the original entry was in fact valid, and compel the holder of the patent to sustain by evidence the finding by the department that it was illegal. No hardship could result to the holder of the patent from such a rule; for the fact that the cancellation of the original entry was *ex parte* will appear from the records of the Land Office, and he is therefore chargeable with knowledge that the question of fact whether such entry was legal is still open to investigation in the courts, and that from the very nature of the case the original entryman, or those claiming under him, should not be held after the lapse of a considerable period of time to a high decree of proof to establish a *prima facie* right.

It is urged that inasmuch as defendant Bladow, who made the second entry and subsequently secured the patent, was also the person who succeeded to Anderson's interest in the land, he is estopped from claiming that the mortgage is not a lien on the land; but Bladow did not assume the mortgage nor did the deed to him even state that he took the land subject to the mortgage. There is no element of estoppel in the case. Bladow is not questioning the legal sufficiency of the mortgage as a contract, nor does he assert that it is not a lien on whatever interest Anderson had in the land. He is merely claiming title from a different source. When he purchased the land from Anderson's grantees he entered into no implied agreement that in case Anderson's entry was fraudulent and was finally overthrown he would not purchase the land from the Government without taking care of the mortgage debt. He did not borrow the money or assume the mortgage, nor are we able to discover from this record that he is even under any moral obli-
26 gation to see that it is paid. The amount of such mortgage does not appear to have been deducted from the purchase price when he bought from Anderson's grantee; and if this were the fact he would be under no legal or moral obligation to pay it under the facts of this case, for it appears that every dollar he paid for Anderson's title was money thrown away. The deed he obtained gave him no title, nor did it place him in a position to contest the legality of Anderson's entry different from that which he occupied before it was delivered to him. It was of no advantage to him whatever.

The judgment of the district court is affirmed. All concur.

(69 N. W. Rep., 41.)

Thereupon, on the 10th day of November, 1896, the supreme court of the State of North Dakota transmitted to the district court of Richland county the following—

Remittitur.

File No. 399.

STATE OF NORTH DAKOTA, *In Supreme Court,* } *ss:*

GUARANTY SAVINGS BANK, Plaintiff and Appellant,
vs.
ALBERT BLADOW, Defendant and Respondent.

Appeal from the district court of Richland county.

This action coming on to be heard at the April, A. D. 1896, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota—present, Alfred Wallin, chief justice; Guy C. H. Corliss and J. M. Bartholomew, associate justices—and the appeal having been argued by Fred B. Morrill, for the appellant,

and by W. E. Purcell, for the respondent, and the court having
27 advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court within and for Richland county appealed from herein be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated November 10th, 1896.

By the court:

ALFRED WALLIN,
Chief Justice.

Attest: R. D. HOSKINS, *Clerk.*

[Seal of the Supreme Court of North Dakota.]

Thereupon, on the 12th day of May, 1898, the district court of Richland county entered the following—

Judgment.

The above-entitled action having been duly heard and determined by the district court and a judgment entered in favor of the defendant Albert Bladow and against The Guaranty Savings Bank, plaintiff, for the costs and disbursements of said action and other relief on the 15th day of July, 1895, which judgment appears of record in this court, and the plaintiff having taken an appeal to the supreme court of the State of North Dakota from said judgment, and the supreme court having, on said appeal, affirmed said judgment and ordered the entry of judgment for the costs of said appeal against the plaintiff, Guaranty Savings Bank, and in favor of said Albert Bladow, as appears by the remittitur of the supreme court filed herein:

28 Now, therefore, on motion of Messrs. W. E. Purcell and Charles E. Wolfe and in order to conform with the proceedings heretofore had in said case, it — hereby adjudged and decreed that the judgment heretofore entered in said cause on the 15th day of July, 1895, in favor of said Albert Bladow and against the Guaranty Savings Bank be, and the same is hereby, in all things affirmed; and it is further adjudged and decreed that said Albert Bladow, defendant, have and recover of the Guaranty Savings Bank the sum of $36.00, costs and disbursements on the appeal in said case as heretofore taxed and allowed.

Witness the Honorable W. S. Lauder, judge of the fourth judicial district of the State of North Dakota, and the seal of said court, at Wahpeton, Richland county, this 12th day of May, 1898.

[SEAL.] C. A. McKEAN,
Clerk of the District Court, Richland County, N. Dak.

Thereupon the plaintiff in error herein applied to the Supreme Court of the United States for a writ of error to review the decision of the supreme court of the State of North Dakota in said action; which writ of error was granted, and the plaintiff in error filed the following—

Assignments of Error.

Comes now The Guaranty Savings Bank, plaintiff in error, by S. B. Pinney, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. That the supreme court of the State of North Dakota erred in holding and deciding that the cancellation of Charley Anderson's entry by the Commissioner of the General Land Office on the *ex parte* contest initiated by Albert Bladow without notice to the Guaranty Savings Bank or its assignor, H. E. Fletcher, was valid as to the plaintiff in error, and that said Commissioner had under the laws of Congress power to cancel said entry and *and* allow Bladow's application to enter without notice to the holder of
29 the mortgage.

Second. That the action of the Commissioner of the General Land Office in cancelling Anderson's entry and allowing Bladow's entry without notice to the owner of the mortgage was a nullity as to said mortgage, and the said mortgage in question having been given and received in good faith for a valuable consideration prior to March 1st, 1888, and after the final entry of Charley Anderson under the provisions of section 7 of the act of Congress approved March 3rd, 1891, entitled "An act for the repeal of the timber-culture law and for other purposes," the plaintiff in error was entitled to a confirmation and patent of the entry of Charley Anderson, and the supreme court of North Dakota erred in declining to so hold and decide.

And whereas by the law of the land the said judgment ought to have been for the said plaintiff in error, Guaranty Savings Bank, and against said defendants in error, Charley Anderson, Albert Bladow, and Franklin Hall, *and* the said Guaranty Savings Bank, plaintiff in error, prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which *he* hath lost by occasion of the said judgment.

S. B. PINNEY,
Attorney for Plaintiff in Error.

[Endorsed:] Case No. 16,984. Supreme Court U. S., October term, 1898. Term No., 399. Guaranty Savings Bank, pl'ff in error, *vs.* Albert Bladow. Agreed record. Filed October 25, 1898.